TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 395

WILLIAM D. GORDON, SECRETARY OF BANKING OF PENNSYLVANIA, ETC., PETITIONER,

vs.

JOSEPH OMINSKY AND ROBERT B. ELY, 3RD, FEDERAL RECEIVERS OF CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1934.

CERTIORARI GRANTED NOVEMBER 5, 1934.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 21, 1934.

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[fols. a & 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

March Term, 1933

In Equity

No. 7619

HARVEY STEIGNER and IDA V. STEIGNER, His Wife; EDITH B. GOODE, JULES SKLAR, PHILIP ZINMAN,

v.

CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION

Attorneys:

Charles Polis, Esq., for plaintiff.
C. J. Buckman, Esq., for Secretary of Banking.
Oscar Brown, Esq., for receivers.

DOCKET ENTRIES

Mar. 31, 1933. Bill of Complaint, filed.
Mar. 31, 1933. Subpœna exit, returnable 4/20/33.
Mar. 31. 1933. Motion for appointment of receivers filed.
Mar. 31, 1933. Decree fixing time for hearing motion for appointment of receiver, filed.
Apr. 1, 1933. Subpœna returned—service accepted—with instructions to enter appearance of C. J. Buckman, Esq., for defendant, endorsed thereon and filed.

[fol. 2]

Apr. 18, 1933. Appearance of C. J. Buckman, Esq., for Wm. D. Gordon, Sec'y of Banking of the Commonwealth of Penna. in possession of business, etc., of defendant, filed.
Apr. 18, 1933. Answer filed.
Apr. 18, 1933. Suggestion of taking possession of business, etc., of defendant by Sec'y of Banking of Commonwealth of Penna. filed.
June 2, 1933. Præcipe to place case on argument list, filed.
July 12, 1933. Argued sur motion for appointment of receiver.

July 18, 1933. Opinion, Dickinson, J., denying motion for appointment of receiver, filed.

July 24, 1933. Opinion, Dickinson, J., granting leave to enter decree appointing receivers, filed.

Aug. 2, 1933. Decree appointing Joseph Ominsky and Robert B Ely, 3rd, receivers, filed.

Aug. 18, 1933. Bond of Receivers with New Amsterdam Casualty Co., surety, in $25,000 and decree approving same, filed.

Aug. 22, 1933. Appearance of Wm. A. Schnader, Esq., for Wm. D. Gordon, Sec'y of Banking in possession of business, etc., of Christian A. Fisher Bldg. & Loan Ass'n, filed.

Aug. 22, 1933. Suggestion that designation of defendant be amended, filed.

[fol. 3]

Aug. 23, 1933. Appearance of Oscar Brown, Esq., for receivers, filed.

Aug. 23, 1933. Assignments of Error, filed.

Aug. 25, 1933. Petition for and Order of Court granting appeal, filed.

Sept. 14, 1933. Bond sur Appeal in $250 with Fidelity & Casualty Co., N. Y., and Decree approving bond, filed.

Sept. 14, 1933. Citation allowed and issued.

Sept. 14, 1933. Copy of Notice of Appeal filed.

Sept. 14, 1933. Præcipe for transcript of record sur appeal, filed.

Sept. 18, 1933. Citation returned "Service accepted" and filed.

Sept. 18, 1933. Petition by Anton Namialo for leave to foreclose mortgage and decree granting petition, filed.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed March 31, 1933

To the Honorable the Judges of the said Court:

Harvey Steigner and Ida V. Steigner, his wife, Edith B. Goode, Jules Sklar and Philip Zinman file this bill on

behalf of themselves and all other creditors or stockholders or claimants against defendant who shall join as parties plaintiff herein, and complaining say that:

1. That plaintiffs are citizens of the State of New Jersey, residing as follows:

Harvey Steigner and Ida V. Steigner—Bettlewood, Haddon Township;
Edith B. Goode—Atlantic City;
Jules Sklar—Camden;
Philip Zinman—Camden.

[fol. 5] 2. Christian A. Fisher Building and Loan Association, hereinafter referred to as defendant, is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and engaged in the city and county of Philadelphia, in the conduct of the business of a building and loan association, having been incorporated for that purpose June 18, 1919.

3. The amount in controversy in this matter exceeds the sum of $3000, exclusive of interest and costs.

4. The plaintiffs are members of the defendant association by virtue of their ownership of shares of stock therein on which there has been paid a total sum of $8145, as follows:

(a) Harvey Steigner and Ida V. Steigner, his wife, own

(1) Book No. 1741 for five double shares in the Twelfth Series, on which there has been paid in the sum of $822.50;

(2) Book No. 2464D for five shares in the Eighteenth Series on which there was paid in the sum of $412.50;

(b) Edith B. Goode is the owner of Book No. 1880D for five double shares in the Thirteenth Series, on which there has been paid in the sum of $730;

(c) Jules Sklar is the owner of

(1) Book No. 868 for five shares in the Fifth Series, on which there has been paid in the sum of $600;

(2) Book No. 1124 for five shares in the Eighth Series, on which there has been paid in the sum of $510;

[fol. 6] (3) Book No. 1881 for ten double shares in the Thirteenth Series, on which there has been paid in the sum of $1440;

(4) Book No. 2366 for five double shares in the Seventeenth Series, on which there has been paid in the sum of $480;

(5) Book No. 1740 for ten double shares in the Twelfth Series, on which there has been paid in the sum of $1640;

(6) Book No. 256 for five shares in the Second Series, on which there has been paid in the sum of $720;

(d) Philip Zinman is the owner of Book No. 1742 for five double shares in the Twelfth Series, on which there has been paid in the sum of $790.

5. The aforesaid shares of stock were either declared matured by the defendant or else noted as withdrawn as follows:

(a) On the shares owned by Harvey Steigner and Ida V. Steigner, his wife

(1) Book No. 1741 was declared matured September 17, 1931;

(2) Notice of withdrawal on Book No. 2464D was filed the third Thursday of July, 1931.

(b) On the shares owned by Edith B. Goode, notice of withdrawal was filed the third Thursday of August, 1931.

(c) On the shares owned by Jules Sklar

(1) On Books Nos. 868, 1124, 1881 and 2366, notice of withdrawal was filed June 18, 1931;

[fol. 7] (2) Book No. 1740 was declared matured by the defendant on September 17, 1931;

(3) Book No. 256 was declared matured November 19, 1931.

(d) The shares owned by Philip Zinman were declared matured by defendant on September 17, 1931.

6. The defendant has not paid anything on account of the withdrawals aforesaid.

7. The defendant has paid on account of the maturities aforesaid the following sums:

(a) On the shares owned by Harry Steigner and Ida V. Steigner (Book No. 1741), $400, leaving a balance of $600.

(b) On the shares owned by Jules Sklar (Book No. 1740), $800, leaving a balance of $1200.

(c) On the shares owned by Philip Zinman (Book No. 1742), $388, leaving a balance of $582.

8. By reason of the aforesaid, the defendant is indebted to the plaintiffs in the sum of $7554.50.

(a) Harvey Steigner and Ida V. Steigner, $1012.50.

(b) Edith B. Goode, $730.

(c) Jules Sklar, $5230.

(d) Philip Zinman, $582.

9. The defendant is indebted to its banks for borrowed money to the extent of approximately $150,000, and is indebted to other preferred creditors on claims arising other than from the ownership of stock in the amount of $50,000 [fol. 8] or a total of approximately $200,000.

10. Defendant association is now and has been for a long time insolvent and the real, actual and fair value of its assets is far less than its liability to stockholders, on dues paid in together with its general indebtedness, and at the present time its capital of approximately $1,000,000 is actually impaired to the extent of approximately 60 per cent., or approximately $600,000.

11. During the past year or more defendant has sustained losses of approximately $500,000 on its mortgage loans of approximately $1,293,250; during said time defendant has been operating and carrying the real estate which it was compelled to buy in on foreclosure of many of its mortgages at a great loss; and during said period defendant has abandoned a large amount and proportion of its assets.

13. By reason of its present insolvent condition, which has existed for the past year and more, defendant has abandoned entirely the active conduct of its business; for

more than two years has made no mortgage loans; has practically ceased making stock loans; for more than two years has made no payment of withdrawals, although it now has a withdrawal list in excess of $300,000, and the payment of dues, interest and premiums on its outstanding mortgage loans are considerably in arrears in an amount which cannot be estimated by the plaintiffs.

14. As a result of its existing insolvency, defendant has abandoned the collection of further dues on free shares and has refused to receive dues from free shareholders so that [fol. 9] its income consists exclusively of rents and payments received from borrowers on their loans.

15. By reason of the existence of approximately $300,000 in withdrawals still unpaid, of its large outstanding indebtedness for borrowed money and preferred claims of outstanding creditors in the amount of approximately $200,000, defendant has been and is subject to seizure of its assets by many of its creditors or stockholders, as a result of which the assets of defendant may be dissipated and its assets be subjected to forced sales and thereby destroyed as assets of defendant.

16. The following officers of the defendant association and who are still in control of the association's business, have been indicted for embezzlement and misapplication of building and loan funds in the Court of Quarter Sessions of Philadelphia County, as follows:

President—Christian A. Fisher, October Term, 1932, No. 1338-42, November Term, 1932, No. 1224-33, 51, 53, 58, 63.

Vice-President—Fred Shmidheiser, October Term, 1932, No. 1342, 47, November Term, 1932, No. 1234-49, 56, 57, 66-70.

Secretary—P. William Huster, October Term, 1932, No. 1340, 41, November Term, 1932, No. 1224-30.

Treasurer—Harry A. Rau, October Term, 1932, No. 1338-41, November Term, 1932, No. 1224-49.

Conveyancer—George A. Nahm, October Term, 1932, No. 1343-47, November Term, 1932, No. 1234-36, 50-55, 61-64, 69, 70.

[fol. 10] 17. Unless defendant's assets are conserved and its affairs managed and conducted free of preferences, plaintiffs and other claimants against the assets of defend-

ant, creditors as well as stockholders, will be without means of securing payment of their claims or of participating equally in the assets of defendant along with other claims or stockholders equal in class or priority.

18. By reason of the foregoing, in the interest of plaintiffs as well as of others having the same rights against defendant, and of all its members and creditors, and to prevent immediate and irreparable loss or damage, defendant's affairs should be liquidated and its assets distributed under the equitable and impartial supervision of a court of competent jurisdiction.

19. Wherefore plaintiffs, being in need of equitable relief and having no adequate remedy at law and having relief only in equity, file this bill of complaint on behalf of themselves and all parties in interest who may come in and contribute to the expense of this action, and plaintiffs pray your Honorable Court:

(a) That a receiver or receivers be appointed temporarily until hearing and finally thereafter to take charge of and manage the property and assets of Christian A. Fisher Building and Loan Association, a corporation, the defendant, of every nature and wheresoever the same may be situate in whosoever hands the same may be;

(b) That said receiver or receivers be authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, [fol. 11] papers, and records and all other property, real and personal of whatsoever kind, character or description and wheresoever situate of Christian A. Fisher Building and Loan Association, the defendant, and to institute, prosecute, intervene, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or action; and including also the institution and prosecution of such ancillary proceedings, all as said receiver or receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said receiver or receivers may deem advisable or proper;

(c) That each and every the officers, directors, agents, employees, and servants of defendant and all other persons be required and commanded forthwith upon demand of said receiver or receivers to deliver up to him or them all and every part of the property and assets of defendant wheresoever situate including also all banks, records and documents of, concerning or in any way relating to the defendant or its business;

(d) That your Honorable Court marshal the assets of defendant and ascertain the respective liens and priorities existing against the property of defendant and the rights, liens and equities of its creditors, stockholders or other claimants;

(e) That the directors, officers and agents of defendant, its creditors, stockholders and claimants and all other per- [fol. 12] sons be enjoined and restrained from selling, transferring, assigning or disposing of or in any manner interfering with any of the property of defendant, or interfering with the said receiver or receivers in the performance of his or their duty, and that they or any of them deliver up, transfer, convey and assign to said receiver or receivers all or any of the property or property rights of defendant;

(f) That the directors, officers and agents of defendant, its creditors, stockholders and claimants and all other persons be enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in anywise interfering or intermeddling therewith;

(g) That said receiver or receivers proceed forthwith with the care and management of the property and assets of defendant and liquidate the business and property and assets of defendant in such manner as they may deem necessary or proper;

(h) That your Honorable Court grant such other and further relief and such other and further powers to said receiver or receivers as the exigencies of the case may require and as to your Honorable Court may seem proper.

And they will ever pray, etc.

Charles Polis, Attorney for Plaintiffs.

[fol. 13] *Duly sworn to by Harvey Steigner. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION FOR APPOINTMENT OF RECEIVER—Filed March 31, 1933

And now, comes the plaintiff in the above-named case and moves the Court for the appointment of a receiver for the causes set forth in the bill of complaint filed therein.

Charles Polis, Attorney for Plaintiff.

[fol. 14] IN UNITED STATES DISTRICT COURT

ORDER FIXING TIME FOR HEARING ON MOTION FOR APPOINTMENT OF RECEIVER—Filed March 31, 1933

Before WALSH, J.

And now, March 31, A. D. 1933, upon the filing of the bill of complaint in the above-entitled case and upon consideration thereof, it is

Ordered that the hearing sur motion for the appointment of a receiver of the above-named defendant company be and the same is hereby fixed for Friday, April 21, 1931 at 10 o'clock A. M.

It is further ordered that copies of the bill of complaint, of the motion for receiver and of this order be served upon the defendant company on or before Wednesday, April 5, 1933.

It is further ordered that answering affidavits to the motion for the appointment of receiver be filed and served upon Charles Polis, Esq., attorney for the plaintiff, on or before Wednesday, April 19, 1933.

By the Court.

Attest:

Leo A. Lilly, Deputy Clerk.

[fol. 15] IN UNITED STATES DISTRICT COURT

SUGGESTION AS TO SUBSTITUTION—Filed April 18, 1933

And now, April 18, 1933, comes Clarence J. Buckman, Esq., whose appearance was entered for the defendant in the above-entitled case, and states that William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, on April 8, 1933, took possession of the business and property of the Christian A. Fisher Building and Loan Association, a corporation, in accordance with the provisions of the Banking Act of the Commonwealth of Pennsylvania of 1923 and its amendments and suggests that William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, be substituted as defendant in place and stead of Christian A. Fisher Building and Loan Association, a corporation.

(Sgd.) Clarence J. Buckman, Special Counsel for William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Christian A. Fisher Building and Loan Association, a Corporation.

[fol. 16] IN UNITED STATES DISTRICT COURT

ANSWER TO BILL OF COMPLAINT—Filed April 16, 1933

To the Honorable the Judges of the said Court:

The answer of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Christian A. Fisher Building and Loan Association, as stated by Robert B. Ely, 3rd, his Special Deputy as agent, respectfully represents:

1. In answer to paragraph No. 1 of the bill of complaint filed, respondent avers that the books and papers in his possession failed to disclose any stockholders or shareholders known as "Edith B. Goode, Jules Sklar, Philip Zinman"; that the books and records in the possession of respondent do not indicate the addresses of Harvey Steig-

ner and Ida V. Steigner, who are shareholders in the Christian A. Fisher Building and Loan Association. Respondent, therefore, requests that the place of residence of complainants be proved if deemed material.

2. Admitted that the facts set forth were true as of the date of the filing of the bill of complaint. Respondent avers, however, that the business and property of the Christian A. Fisher Building and Loan Association was taken possession of by William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, on April 8, 1933, by virtue of the provisions of the Banking Act of 1923 and its amendments and that he did appoint Robert B. Ely, 3rd, as Special Deputy as agent in charge thereof.

3. Admitted.

[fol. 17] 4. In answer to paragraph No. 4 of the bill of complaint filed respondent avers that:

(a) According to the books and records in his possession Harvey Steigner and Ida V. Steigner are the owners of Book No. 1741 on which there has been paid in a total of $420 and also Book No. 2464D on which there has been paid in the sum of $420.

(b) According to the books and records of the association Sarah E. Lewis is the owner of Book No 1880D on which there has been paid in a total of $690.

(c) According to the books and records of the association, which are in the possession of respondent, Jennie R. Lewis is the owner of the following books on which there has been paid in the amounts set forth below:

Book No. 868	$600
Book No. 1124	$510
Book No. 1881	$1440
Book No. 2366	$480
Book No. 1740	$840

and that William R. Lewis is the owner of Book No. 256 on which there has been paid in the sum of $720.

(d) According to the records and books of the Christian A. Fisher Building and Loan Association, in possession of respondent, Nathan Lewis is the owner of Book No. 1742 on which there has been paid in a total sum of $402.

Respondent, therefore, for the purpose of these proceedings denies that Edith B. Goode, Jules Sklar and Philip Zinman, or any of them, are stockholders or shareholders in the Christian A. Fisher Building and Loan Association and asks that this fact be proved if deemed material.

[fol. 18] 5. (a) In answer to the averment of paragraph No. 5 in the bill of complaint filed, respondent admits that the shares of stock owned by Harvey Steigner and Ida V. Steigner, his wife, represented by Book No. 1741 was declared matured on September 17, 1931. Respondent avers, however, that the maturity of said shares of stock was rescinded by vote of the board of directors on October 20, 1932. Respondent has been unable to locate any record of notice of withdrawal on Book No. 2464D.

(b) Respondent avers that Book No. 1880 according to the records in his possession is owned by Sarah E. Lewis. There is no record of any notice of intention to withdraw.

(c) Respondent denies that there is any stock in the association owned by Jules Sklar; and avers that the books represented as being owned by him in the bill of complaint filed are, according to the records of the association, which are in the possession of respondent, owned by Jennie R. Lewis and William R. Lewis. Respondent has no record of any notice of withdrawal with respect to any of these shares of stock; admits declaration of maturity of Book No. 1740 on September 17, 1931, and Book No. 256 on November 19, 1931, but avers that the declaration of maturity of these series was rescinded by the action of the board of directors at a meeting held on October 20, 1932.

(d) According to the records in possession of respondent, Philip Zinman is not a stockholder in the Christian A. Fisher Building and Loan Association, the stock alleged in the bill of complaint filed being owned by him is registered in the name of Nathan Lewis. This particular stock was declared matured on September 17, 1931, but the declara-[fol. 19] tion of maturity was rescinded at a subsequent meeting of the board of directors on October 20, 1932.

6. Admitted.

7. In reply to the averments in this paragraph respondent avers that the records in his possession do not disclose

any payments on account of maturities and further avers that the records in his possession show that the shares alleged to be owned by Jules Sklar and Philip Zinman do not stand in the names of these parties but as above set forth, which are recorded as being owned by Jennie R. Lewis, William R. Lewis and Nathan Lewis.

8. In answer to paragraph No. 8 of the bill of complaint filed, respondent denies that the Christian A. Fisher Building and Loan Association was indebted to the plaintiffs in the sum of $7,554.50 for the reason that according to the books and records in possession of respondent Edith B. Goode, Jules Sklar and Philip Zinman are not stockholders or shareholders in the Christian A. Fisher Building and Loan Association and that, therefore, the only indebtedness of the association to any of the complainants is to Harvey Steigner and Ida V. Steigner, which amounts according to the records of the association are $840 and not $1,012.50 as set forth in paragraph No. 8 of the bill of complaint filed.

9. Admitted.

10. In answer to paragraph No. 10 of the bill of complaint filed, respondent admits that the facts set forth therein are substantially correct but pending completion of an audit of the books of the association and an appraisement of all its assets is unable to quote accurate figures.

[fol. 20] 11. In answer to paragraph No. 11 of the bill of complaint filed, respondent admits that the facts therein set forth are substantially correct. However, pending the completion of the audit and appraisement of the assets is unable to give any accurate figures as to losses, etc.

13. In reply to paragraph No. 13, respondent admits that the association at the present time is insolvent in that it is unable to pay its stockholders in full but has no knowledge as to how long this condition existed prior to the date the Secretary of Banking took possession thereof on April 8, 1933. It is denied, however, that the association had abandoned entirely the active conduct of its business. On the contrary, it is averred that the association had functioned for some time prior to the date possession of the association was taken by respondent on a limited basis. That is to say, the officers were in active charge thereof

taking all steps necessary to protect the assets of the association; payments were received on account of the principal and interest but no contributions were received in the way of dues.

14. Admitted.

15. Respondent denies that the association or its assets are subject to seizure by any of its creditors or stockholders and further denies that any of the assets of the association may be dissipated or subjected to forced sales and thereby destroy its assets. On the contrary, respondent avers that the action of the Secretary of Banking in taking possession of this association on April 8, 1933, has fully protected the interest of all parties interested in this association either as stockholders or creditors; that the [fol. 21] assets are not now subject to seizure nor attachable by any creditor; that the same will be disposed of by the Secretary of Banking in such manner as to realize the most for distribution to the parties entitled.

16. Admitted with the exception that Christian A. Fisher, the president of the association, has been acquitted.

17. Denied. Respondent avers that the action of the Secretary of Banking in taking possession of the business and property of the association will result in an equal distribution to parties of the same class and the preservation of the assets of the association.

18. This is exactly what has been done by virtue of the Secretary of Banking taking possession of this association. A certificate of possession has been filed in the Court of Common Pleas No. 4 of Philadelphia County as of March Term, 1933, No. 4445, and the action of the Secretary of Banking in administering the affairs of this association are subject to the approval of the said Court.

19. In view of the fact that the Secretary of Banking has taken possession of the business and property of the association in accordance with the provisions of the Banking Act of 1923 and its amendments and will administer the affairs of the association as a receiver subject to the confirmation of the Court of Common Pleas of Philadelphia County where the certificate of possession is registered, which will result in the preservation of the assets of the association and proper distribution of funds realized from the

liquidation of the assets, it is respectfully submitted to your Honorable Court that the bill of complaint filed in this mat-
[fol. 22] ter be dismissed as there is now no need for the appointment of a receiver by your Honorable Court.

And he will ever pray.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Christian A. Fisher Building and Loan Association, by (Sgd.) Robert B. Ely, 3rd, Special Deputy as Agent.

Duly sworn to by Robert B. Ely, 3rd. Jurat omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR APPOINTMENT OF RECEIVERS—Filed July 18, 1933

DICKINSON, J.:

This motion confronts us with a situation, not a theory. The law is well settled. No Court without justification for its refusal to act, can deny to those lawfully invoking it the exercise of its jurisdiction. Resort to the remedy sought is a right of the litigants. Different Courts may however have the like jurisdiction. When its exercise includes the control of a rem one only can function. This is a law of physics. Human laws have their policies as well as their doctrines. The law may have conferred jurisdiction over the same subject matter upon two or more different tribunals. The doctrine of the law is that any one may function. When, however, the exercise of jurisdiction means control of a rem an unseemly conflict is unavoidable after one has possession in fact. If possession in fact has not been taken as unseemly a race results. In such a situation the law without abandoning its doctrine interposes a policy. The policy is to avoid a conflict. This is accomplished by the simple expedient of all Courts according the exercise of jurisdiction to the tribunal which was the first to act. This, although a rule of policy, is practically such a necessary rule that it has the force of law. The very admirable brief of counsel for the plaintiffs makes this clear. The experienced counsel for defendant does not controvert it. The tribunals

here are this Court and the Commissioner of Banking for Pennsylvania. Whatever the truth may be we cannot concede that we should refuse to exercise jurisdiction because [fol. 24] the Commissioner's Office is equipped to render better service than is this Court. This is a matter of opinion. If the plaintiffs are so persuaded they can withdraw their Bill. If it is the right of the plaintiffs to have this Court function we must do so. The merits of the Bill have however not as yet been determined. The motion before us does not in essentials differ from the ordinary motion for a preliminary injunction. If, for illustration, the Bill on final hearing should be dismissed, the appointment of Receivers now would be abortive. A defense to the Bill is at least suggested by the Answer. It may or may not be a defense. If the Bill is sustained on final hearing, all which may have been done by the Commissioner is worse than wasted effort. This leads to a suggestion. All seem to be agreed that the assets of the Association must be taken in charge for administration and distribution. How they can best be administered is a practical question. The desired result can be accomplished in any one of several ways. An opportunity for the parties to confer to perhaps reach an agreement, should be afforded. If they cannot agree, the complications of an abortive Receivership or an abortive administration by the Commissioner should, so far as possible, be avoided. This can be done by an immediate, or at least early, hearing and final decree. If the defendant is prepared to stand on the Answer as filed and the plaintiffs think it unsufficient, the cause can be set down for a hearing on Bill and Answer. Neither of these methods of final disposition of the case should take more time than the present motion will require.

To afford opportunity to try out this suggestion, the motion for the appointment of Receiver is for the present denied, with leave to the plaintiffs to renew it at any time.

[fol. 25] IN UNITED STATES DISTRICT COURT

OPINION SUR HEARING OF CAUSE SET DOWN FOR HEARING ON BILL AND ANSWER—Filed July 24, 1933

DICKINSON, J.:

This is a Receivership Bill. We heard it on a motion for the appointment of Receivers. We are asked now to

dispose of it on final decree, the plaintiffs asking this by setting down the cause for a hearing on Bill and Answer. This is the equivalent of a demurrer to the Answer and accepts all its averments as verities.

A few general propositions may be formulated. Some of them are re-statements.

1. This Bill belongs to the class, the prayer of which is that the Court take over the administration and liquidation of the assets of the defendant corporation to save them from waste and improper diversion. Such Bills are the practical equivalent of assignments for the benefit of creditors. Whatever might at one time have been said on the subject of the equitable jurisdiction invoked, the practice of filing such Bills has become too well established to be now questioned. It is not here questioned but an altogether different question has been raised.

2. The only defense we can extract from this Answer is that the prayer for the appointment of Receivers should be denied because the Commissioner of Banking has now taken over the affairs and assets of the defendant and that all which can be done by this Court can and will be better done by the Commissioner.

[fol. 26] 3. It must be kept in mind that there are two prayers in this Bill, as in all such Bills. One is for the appointment of Receivers on final decree after the merits of the Bill have been heard and determined. The other is for a preliminary appointment of Receivers to act pending such final hearing. Such an appointment is the equivalent of a motion for preliminary injunction and is an anticipation of a final decree sustaining the Bill, if finally sustained, or otherwise is a mere ad interim working arrangement.

4. The latter motion was heard but no Receivers were appointed for the obvious reason that there was no need of a caretaker pending final hearing as the Commissioner of Banking was, at the time of the hearing, so acting.

5. The situation thus created was objectionable in that, if the Bill was finally sustained, the intrusion of the Commissioner would be found to be unwarranted and he could not efficiently function under this uncertainty. Moreover all his work would be wasted.

6. There were only two ways to overcome this difficulty. One was by having the Bill pushed to an early final decree; the other was to have the cause set down for a hearing on Bill and Answer if the defendant was willing to rest its defense on that set up. The parties have chosen the latter method.

7. The cause thus resolves itself into the one question of whether this Court or the Commissioner of Banking for Pennsylvania shall exercise jurisdiction over the administration of the affairs and distribution of the assets of the defendant corporation.

8. Whenever a litigant has the right to invoke the judicial powers of a Court, the exercise of its power and jurisdic-
[fol. 27] tion cannot be refused. A Court is no more warranted in refusing to function when it has jurisdiction than it is in usurping powers which it does not possess.

9. When two tribunals possess coordinate jurisdiction over the same rem, the doctrine is well established that the exercise of jurisdiction must be left to that one which is the first to act. The choice is determined solely by the calendar. The fact, if it be one, that the tribunal to which the second appeal is made, is better equipped to deal with the subject matter and that its administration would be more efficient is, for obvious reasons, not controlling. The illuminating opinion accompanying the ruling of the Circuit Court of Appeals for the Third Circuit has placed this doctrine beyond the pale of discussion.

10. The Answer filed admits this Court to have first asserted jurisdiction. It must in consequence continue to act.

A decree in accordance with these conclusions and appointing Receivers, may be submitted.

[fol. 28] IN UNITED STATES DISTRICT COURT

DECREE APPOINTING PERMANENT RECEIVERS—Filed August 2, 1933

Before Dickinson, J.

And now, to wit, this second day of August, 1933, this cause having come on for hearing sur motion for the ap-

pointment of permanent receivers on bill and answer, it is hereby ordered, adjudged and decreed as follows:

1. That Joseph Ominsky and Robert B. Ely, 3d, be and they hereby are appointed permanent receivers of the above-named defendant, Christian A. Fisher Building and Loan Association and of all of its property and assets of every nature and wheresoever the same may be situate and in whosesoever hands the same may be, and to proceed forthwith with the care and management of the property and assets of defendant and to liquidate the business and property and assets of defendant in such manner as they may deem necessary or proper, and for so doing to employ such persons and make such payments and disbursements as may be needful and proper, and said permanent receivers may upon application to and authority from this Court borrow such sums of money as in their judgment may be needful in order to preserve and protect the aforesaid property and assets of defendant, and to keep the same in proper condition or repair.

2. That said permanent receivers be and they hereby are authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, papers and records and all other property, [fol. 29] real and personal of whatsoever kind, character or description and wheresoever situate of Christian A. Fisher Building and Loan Association the defendant, and to institute, prosecute, intervene in, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or actions; and including*ing* also the institution and prosecution of such ancillary proceedings, all as said permanent receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said permanent receivers may deem advisable or proper.

3. The defendant, Christian A. Fisher Building and Loan Association, its officers, directors, agents, employees and servants and all other persons be and the same are hereby required and commanded forthwith upon demand

of said permanent receivers to deliver up to them all and every part of the property and assets of defendant wheresoever situate including also its books, records and documents of, concerning or in any way relating to the defendant or its business;

4. That defendant, Christian A. Fisher Building and Loan Association, its officers, directors, agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from selling, transferring, assigning or disposing of or in any manner interfering with any of the property of defendant or interfering with the said permanent receivers in the performance of their duty and all or any of such persons are hereby ordered and required to deliver up, transfer, convey and assign to said permanent receivers all or any of the property or property rights of defendant.

[fol. 30] 5. That defendant, Christian A. Fisher Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity or otherwise against defendant or against said permanent receivers, or foreclosing upon, selling or in any wise disposing of any property of defendant or on which defendant holds any lien or encumbrance, without leave of this Court or the approval of said permanent receivers first had and obtained and said persons be and they are hereby enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in any wise interfering or intermeddling therewith.

6. Security to be entered by said receivers in the amount of $25,000. Receivers to report preliminarily within thirty days.

7. It is further ordered, adjudged and decreed that any moneys coming into the hands of the said permanent receivers shall be deposited in a designated depository approved by this Court, and that he advise the clerk of this court in writing of the name of the depository and of the date of the opening of the account therein.

8. Leave is given to any party in interest to move to modify or vacate the order of appointment of said receivers.

By the Court.

Attest: Leo A. Lilly, Deputy Clerk.

[fol. 31] In United States District Court

Suggestion as to Amendment of Title—Filed August 22, 1933

And now, this twenty-third day of August, 1933, comes William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, whose appearance has been entered for the defendant in the above-entitled case, and states:

Whereas at the time William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, took possession of the business and property of the Christian A. Fisher Building and Loan Association, a corporation, in accordance with the provisions of the Banking Act of the Commonwealth of Pennsylvania of 1923, and its amendments, the said Banking Act provided that the said Secretary of Banking as being, "In possession of the business and property of the Blank Association."

And whereas since the time of the said taking of possession there has been passed the Banking Act of 1933, Act No. 111 of the year 1933, under the terms of which (Section 601) it is provided that the official title of the Secretary of Banking, when thus in possession of the business and property of a given institution, shall be receiver of such institution.

And now, therefore, it is suggested that the designation of the above-named defendant be amended to read, "William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of the Christian A. Fisher Building and Loan Association."

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by (Sgd.) Clarence J. Buckman, Attorney for Defendant.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed August 25, 1933

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of the Christian A. Fisher Building & Loan Association, considering himself aggrieved by the decree of this Court entered on the second day of August, 1933, wherein and whereby the petition of the above-named plaintiffs praying for the appointment of permanent receivers was granted in that one Joseph Ominsky and one Robert B. Ely, 3d, were appointed permanent receivers of the above-named Christian A. Fisher Building & Loan Association with the usual powers, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of error filed and prays that this appeal may be allowed and that a transcript of [fol. 33] the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

Petitioner further prays that all proceedings be stayed until this appeal be finally adjudicated by the said Circuit Court of Appeals said appeal being in all respects made to operate as a supersedeas.

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by (Sgd.) Clarence J. Buckman, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed August 25, 1933

And now, to wit, this twenty-third day of August, 1933, the appeal of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of the Christian A. Fisher Building & Loan Association, the defendant in the above-entitled case, to the United States Circuit Court of Appeals for the Third Circuit is hereby allowed.

Security to be first entered in the sum of $250.

By the Court.

Dickinson, J., Attest: Theodore L. Cobaugh, Deputy Clerk.

[fol. 34] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed August 23, 1933

And now, this twenty-third day of August, 1933, comes the petitioner, the above-named defendant, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of the Christian A. Fisher Building & Loan Association, by W. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, having prayed for an appeal to the United States Circuit Court of Appeals for the Third Circuit from the final decree of the United States District Court for the Eastern District of Pennsylvania entered on or about the second day of August, 1933, granting the above-named plaintiff's petition for the appointment of permanent receivers of the said Christian A. Fisher Building and Loan Association naming Joseph Ominsky and Robert B. Ely, 3d, as such receivers, and assigns as error that the District Court erred as follows:

First. In ordering and decreeing that the above-named plaintiffs' prayer for the appointment of receivers be granted and that the said Joseph Ominsky and Robert B. Ely, 3d, be named as such receivers the said decree being as follows:

"And now, to wit, this 2d day of August, 1933, this cause having come on for hearing sur motion for the appointment of permanent receivers on Bill and Answer, it is hereby ordered, adjudged and decreed as follows:

1. That Joseph Ominsky and Robert B. Ely, 3d, be and they hereby are appointed permanent receivers of the above-named defendant, Christian A. Fisher Building and Loan Association and of all of its property and assets of [fol. 35] every nature and wheresoever the same may be situate and in whosesoever hands the same may be, and to proceed forthwith with the care and management of the property and assets of defendant in such manner as they may deem necessary and proper, and for so doing to em-

ploy such persons and make such payments and disbursements as may be needful and proper, and said permanent receivers may upon application to and authority from this Court borrow such sums of money as in their judgment may be needful in order to preserve and protect the aforesaid property and assets of defendant, and to keep the same in proper condition or repair.

2. That said permanent receivers be and they hereby are authorized and empowered to demand, sue for, collect, receive and take into their possession all the goods, chattels, rights, credits, moneys, effects, lands, tenements, choses in action, books, papers and records and all other property, real and personal of whatsoever kind, character or description and wheresoever situate of Christian A. Fisher Building and Loan Association the defendant, and to institute, prosecute, intervene in, become party to, defend or compromise suits at law or in equity for the protection, recovery or maintenance of any of the property and assets, rights, damages or demands of or belonging to the defendant including also the power to continue in such pending suits or actions; and including also the institution and prosecution of such ancillary proceedings, all as said permanent receivers may deem necessary or proper, and to settle and compound or make allowance on any and all debts now due or owing to the defendant as said permanent receivers may deem advisable or proper;

3. The defendant, Christian A. Fisher Building and Loan Association, its officers, directors, agents, employees and servants and all other persons be and the same are hereby required and commanded forthwith upon demand of said [fol. 36] permanent receivers to deliver up to them all and every part of the property and assets of defendant wheresoever situate including also its books, records and documents of, concerning or in any way relating to the defendant or its business;

4. That defendant, Christian A. Fisher Building & Loan Association, its directors, officers and agents, its creditors, stockholders and Claimants and all other persons be and they hereby are enjoined ,and restrained from selling transferring, assigning or disposing of or in any manner interfering with any of the property of defendant or interfering with the said permanent receivers in the perform-

ance of their duty and all or any of such persons are hereby ordered and required to deliver up, transfer, convey and assign to said permanent receivers all or any of the property or property rights of defendant,

5. That defendant, Christian A. Fisher Building and Loan Association, its directors, officers and agents, its creditors, stockholders and claimants and all other persons be and they hereby are enjoined and restrained from commencing, prosecuting or continuing to prosecute any action at law or in equity or otherwise against defendant or against said permanent receivers, or foreclosing upon, selling or in any wise disposing of any property of defendant or on which defendant holds any lien or encumbrance, without leave of this Court or the approval of said permanent receivers first had and obtained; and said persons be and they are hereby enjoined and restrained from levying, executing upon, attaching, intermeddling with or taking possession of all or any of the property of defendant and from taking or attempting to take into their possession any of the property of defendant or in anywise interfering or intermeddling therewith.

6. Security to be entered by said receivers in the amount of $25,000.00. Receivers to report preliminarily within thirty days.

[fol. 37] 7. It is further ordered, adjudged and decreed that any monies coming into the hands of the said permanent receivers shall be deposited in a designated depository approved by this Court, and that he advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein.

8. Leave is given to any party in interest to move to modify or vacate the order of appointment of said receivers.

By the Court.

Dickinson, J."

Second. In not ordering and decreeing that the above-named plaintiffs' petition for the appointment of permanent receivers of the Christian A. Fisher Building & Loan Association be dismissed as prayed for in the answer duly filed by petitioner herein.

Wherefore your petitioner prays that the said order and decree of the said District Court be reversed and that an

order be entered by it dismissing the above-mentioned plaintiffs' bill for the appointment of permanent receivers as heretofore prayed in the answer filed by the within petitioner.

Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by (Sgd.) Clarence J. Buckman, Attorney for Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

PRÆCIPE RE TRANSCRIPT ON APPEAL—Filed September 14, 1933

To the Clerk of the said Court:

Kindly include in the transcript of record on appeal in the above case the following papers:

1. The docket entries.
2. Bill of complaint.
3. Motion for appontment of receivers.
4. Decree fixing time for hearing motion for appointment of receivers.
5. Suggestion of taking possession of business, etc., of defendant by Secretary of Banking of the Commonwealth of Pennsylvania.
6. Answer of defendant.
7. Opinion, Dickinson, J., denying motion for appointment of receivers.
8. Opinion, Dickinson, J., granting leave for entering decree appointing receivers.
9. Decree appointing Joseph Ominsky and Robert B. Ely, 3d, receivers.
10. Suggestion that designation of defendant be amended.
11. Petition for and order of Court granting appeal.

[fol. 39] 12. Assignments of error.

13. Præcipe of transcript.
14. Clerk's certificate. And no others.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by Clarence J. Buckman, Attorney for Defendant.

[fol. 40] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5267

William D. Gordon, Secretary of Banking of Pennsylvania, Statutory Receiver of Christian A. Fisher Building Loan Association, Appellant,

v.

Joseph Ominsky et al., Federal Receivers of Christian A. Fisher Building and Loan Association et al., Appellees

Minute Entry of Argument and Submission

And afterwards, to wit, the thirteenth day of October, 1933, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the twenty-fifth day of July, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 42] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5267

William D. Gordon, Secretary of Banking of Pennsylvania, Statutory Receiver of Christian A. Fisher Building Loan Association, Intervening Appellant,

v.

Joseph Ominsky and Robert B. Ely, 3rd, Federal Receivers of Christian A. Fisher Building and Loan Association et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion—Filed July 25, 1934

Before Buffington, Davis, and Thompson, Circuit Judges

Davis, Circuit Judge:

The facts in this case are substantially like those in the case of the Commonwealth of Pennsylvania v. John G. Wil-

liams, et al., — Fed. (2d) —, in which an opinion has just been filed. The same issues are involved in this case as were in that. Consequently on the authority of that case, the decree of the District Court is affirmed.

A true Copy. Teste:
—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 43] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5267

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Statutory Receiver of Christian A. Fisher Building & Loan Association, Appellant,

v.

Joseph Ominsky et al., Federal Receivers of Christian A. Fisher Building and Loan Association, et al., Appellees

Order Affirming Decree—Filed July 25, 1934

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of August 2, 1933, of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, July 25, 1934.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 5, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following No. 394.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,023. U. S. Circuit Court of Appeals, Third Circuit. Term No. 395. William D. Gordon, Secretary of Banking of Pennsylvania, etc., petitioner, vs. Joseph Ominsky and Robert B. Ely, 3rd, Federal Receivers of Christian A. Fisher Building and Loan Association, et al. Petition for a writ of certiorari and exhibit thereto. Filed September 21, 1934. File No. 395, O. T., 1934.

FILE COPY

SEP 21
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 395

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, Statutory Receiver of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION,
Petitioner,

v.

JOSEPH OMINSKY and ROBERT B. ELY, 3rd, Federal Receivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

WM. A. SCHNADER,
Attorney General.
HAROLD D. SAYLOR,
Deputy Attorney General.
LEO WEINROTT,
Special Deputy Attorney General.
Counsel for Petitioner.

State Capitol,
Harrisburg, Pa.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, Statutory Receiver of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION,
Petitioner,

v.

JOSEPH OMINSKY and ROBERT B. ELY, 3rd, Federal Receivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William D. Gordon, Secretary of Banking of Pennsylvania, statutory receiver of Christian A. Fisher Building and Loan Association, respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) The Decrees Below.

Your petitioner is the Secretary of Banking of the Commonwealth of Pennsylvania and statutory receiver of Christian A. Fisher Building and Loan Association, a corporation of that Commonwealth.

The decree which your petitioner seeks to have this Court review is the final decree of the United States Circuit Court of Appeals for the Third Circuit, entered July 25, 1934, affirming the decree of the United States District Court for the Eastern District of Pennsylvania, entered August 2, 1933, in a suit numbered and entitled on the docket of the District Court, "No. 7619, March Term 1933, HARVEY STEIGNER and IDA V. STEIGNER, His Wife, EDITH B. GOODE, JULES SKLAR, PHILIP ZINMAN, *v.* CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION." The suit was in equity and sought the appointment of receivers to take possession of and liquidate a Pennsylvania building and loan association.

By its decree the District Court appointed Joseph Ominsky and Robert B. Ely, 3rd, as receivers to take possession of and liquidate Christian A. Fisher Building and Loan Association and restrained all others from taking possession of or intermeddling with any of the property of the association without leave of the District Court.

The Commonwealth believes that the decree of the District Court, and of the Circuit Court of Appeals affirming it, were erroneous in that they denied to the Commonwealth of Pennsylvania its right to supervise, regulate and liquidate quasi-public corporations, such as banks and building and loan associations, exclusively through its administrative officers.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the appeal of the Secretary of Banking from the decree of the District Court and the questions for review before this Court are:

1. Has a Federal court equity jurisdiction over a quasi-public corporation of a state, such as a bank or a building and loan association, where the bill of complaint is filed by stockholders, who, under the laws of the state creating the corporation, cannot have a controversy with the corporation as to its liquidation?

2. Are state banks and building and loan associations, as quasi-public corporations, subject to the equity jurisdiction of a Federal court, and may a Federal court appoint receivers for such corporations when the law of the state under which they are organized provides a complete system for their regulation, supervision and liquidation by an administrative department of the state?

3. If a Federal court has equity jurisdiction to liquidate such corporations, was its exercise of such jurisdiction and the appointment of receivers

in this case an abuse of discretion on the part of the court?

4. Where the administrative department of a state charged with the regulation, supervision and liquidation of its building and loan associations is actually liquidating the affairs of an association, has a Federal court the right to appoint receivers and to interfere with such liquidation?

(c) The Statutes Involved.

Challenge of the jurisdiction of the Federal court in this case involves Section 24 of the Judicial Code, as amended (R. S., Secs. 563, 629; 28 USCA Sec. 41 (1)). The right of the Commonwealth of Pennsylvania to administer exclusively through its courts and administrative officers the affairs of banks and building and loan associations was given by the Pennsylvania Act of Assembly of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762 (7 PS Secs. 4, 21, 22, 29), and the Department of Banking Code of May 15, 1933, P. L. 565 (71 PS Secs. 733-1, etc.).

Pertinent sections of the Act of 1923 are set forth in Appendix "B" attached to the petition for writ of certiorari and brief filed with this Court simultaneously with this petition in the case of COMMONWEALTH OF PENNSYLVANIA *v.* JOHN G. WILLIAMS, et al., RECEIVERS OF MORTGAGE BUILDING AND LOAN ASSOCIATION.

(d) Statement of the Facts.

1. On ~~May~~ March 31, 1933, stockholders of a Pennsylvania building and loan association who reside in New Jersey, filed a bill in equity in the District Court of the United States for the Eastern District of Pennsylvania asking for the appointment of receivers to take possession of the association and liquidate its affairs (R. 4, 12).

2. Immediately Judge Welsh, of the District Court, entered an order fixing April 21, ~~1931~~ 1933, as the time for a hearing on the motion for the appointment of a receiver and directed service of the bill of complaint and the order on the defendant association on or before April 5, 1933 (R. 14).

3. On April 8, 1933, at a formal hearing before the Attorney General, held pursuant to law, the defendant association was found to be insolvent and in an unsafe and unsound condition. Thereupon, with the approval of the Attorney General, the Secretary of Banking filed a certificate in his office at Harrisburg taking possession of the business and property of the association, and forthwith filed a certified copy thereof in Court of Common Pleas No. 4 of Philadelphia County, as of March Term, 1933, No. 4445 (R. 16, 21), in accordance with the provisions of the Pennsylvania statutes above referred to.

4. By this procedure the Secretary of Banking took formal legal possession of the association and immediately thereafter took actual possession of its assets

and appointed Robert B. Ely, 3rd, as his deputy to administer the affairs of the association (R. 16, 21).

5. On April 18, 1933, counsel for the building and loan association filed a suggestion (R. 15) that, because the Secretary of Banking of the Commonwealth of Pennsylvania had taken possession of the business and property of the association, that officer be substituted as defendant in the case. On the same day (R. 2), the Secretary of Banking filed his answer to the bill (R. 16).

6. On July 12, 1933, Judge Dickinson of the District Court, heard argument on bill and answer (R. 2) and on July 18, 1933, filed his opinion denying plaintiffs' motion for the appointment of receivers with leave to the plaintiffs to renew it at any time (R. 23, 24).

7. The plaintiffs renewed their motion and on August 2, 1933 (R. 2), Judge Dickinson entered a decree appointing Joseph Ominsky and Robert B. Ely, 3rd, as permanent receivers of the association (R. 28).

8. On appeal to the Circuit Court of Appeals for the Third Circuit, argument was heard on October 13, 1933, and on July 25, 1934, that court affirmed the decree of the District Court entered August 2, 1933.

(e) Rulings of the Court Below.

The Circuit Court of Appeals for the Third Circuit in affirming the decree of the District Court appoint-

ing permanent receivers of the association, ruled that the District Court had jurisdiction to appoint receivers of a state building and loan association and that it had not abused its discretion in making the appointment.

In its opinion filed July 25, 1934 (R. 42) the Circuit Court referred to its opinion filed in the matter of COMMONWEALTH OF PENNSYLVANIA *v.* JOHN G. WILLIAMS, et al., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION. (See transcript of record in connection with petition for writ of certiorari and brief in support thereof, filed by the Commonwealth with this Court simultaneously with this petition, in the MORTGAGE BUILDING AND LOAN ASSOCIATION CASE).

B. REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of the courts of other circuits, which this court has refused to review. It has not differentiated between receivership proceedings for ordinary business or commercial corporations and for quasi-public corporations: AMOS *v.* TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931), C. C. A. Fifth Circuit. Certiorari refused. 285 U. S. 559. MITCHELL *v.* LAY, 48 F.(2d) 79 (1930), C. C. A. Ninth Circuit. Certiorari refused. 283 U. S. 864.

2. The Circuit Court has upheld the District Court in making available to the shareholder of a state

quasi-public corporation the remedy of receivership as a weapon of coercion and a means for the frustration of the public policy of the State: SHAPIRO *v.* WILGUS, 287 U. S. 348 (1932).

3. From the time the Commonwealth of Pennsylvania first established its system for the regulation, supervision and liquidation by the Department of Banking of its banks and building and loan associations until the decision of the District Court in the case of COMMONWEALTH OF PENNSYLVANIA *v.* JOHN G. WILLIAMS, et al., RECEIVERS OF MORTGAGE BUILDING AND LOAN ASSOCIATION, it had been generally understood and believed throughout the Commonwealth that quasi-public institutions chartered by the State were not subject to the equity jurisdiction of the Federal courts.

4. The decision of the Circuit Court of Appeals is in conflict with that practice and with the decision of the Supreme Court of Pennsylvania, the court of last resort of that State, in the case of COMMONWEALTH OF PENNSYLVANIA, ex rel. WILLIAM A. SCHNADER, ATTORNEY GENERAL, *v.* PENN GENERAL CASUALTY COMPANY by opinion filed on June 30, 1934, and antedating the opinion of the Circuit Court in this case. (A copy of the opinion of the Supreme Court of Pennsylvania in that case, written by Mr. Justice Schaffer, is attached as Appendix "A" to the petition for certiorari and brief in support thereof filed with this Court simultaneously with this petition by the Commonwealth of Pennsylvania in the MORTGAGE BUILDING AND LOAN ASSOCIATION CASE).

5. In deciding the PENN GENERAL CASE, the Supreme Court of Pennsylvania reached the conclusion that a Federal court is without jurisdiction in cases involving the liquidation of quasi-public corporations of a state; and that any effort of a Federal court to exercise such jurisdiction would create rather than settle controversies and would strike at the public policy of the state which has created a complete system for the liquidation of such corporations, jurisdiction over which is limited by state law to the courts and the administrative officers of the state.

6. The assumption of jurisdiction by the District Court, and the appointment of receivers after the Secretary of Banking had taken possession of the assets of the association, and the order of the Circuit Court of Appeals upholding such action, create in the Commonwealth of Pennsylvania an impossible situation involving the very existence of its entire system of regulation, supervision and liquidation of quasi-public corporations.

7. The courts below have decided an important question of general law in a way that is untenable. The decision of the Supreme Court of Pennsylvania supporting the heretofore well-recognized practice of non-interference by the Federal courts with the State's complete control over its quasi-public corporations, brings to a head the issue now before this court.

8. The proper determination of the question here presented is of paramount public importance. It is

imperative that this court finally settle a conflict existing between the jurisdiction asserted by the Federal courts and that given by state law exclusively to administrative officers and courts of the state. This settlement is necessary in order that there may be effective and unhampered administration of the banking, building and loan association and insurance laws not only of the Commonwealth of Pennsylvania, but of all other states which have set up systems for the governance of corporations subject to similar laws. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. PRAYER FOR WRIT OF CERTIORARI.

Wherefore, your petitioner respectfully prays:

(a) That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the cause therein entitled "WILLIAM D. GORDON, Secretary of Banking of the Commonwealth of Pennsylvania, Statutory Receiver of the CHRISTIAN A. FISHER BUILDING & LOAN ASSOCIATION, Intervening-Appellant, *v.* JOSEPH OMINSKY and ROBERT B. ELY, Federal Re-

ceivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION and HARVEY STEIGNER and IDA V. STEIGNER, His Wife, EDITH B. GOODE, JULES SKLAR and PHILIP ZINMAN, Appellees," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An act to establish a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, c. 517 (26 Stat. 826-828), amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 USCA 347).

(b) That such remedy in the premises be decreed as to this Court may seem appropriate and in conformity with said act; that the decree of the United States Circuit Court of Appeals for the Third Circuit in said cause, and of the District Court of the United States for the Eastern District of Pennsylvania, and each and every part thereof may be reversed by this Court, and said courts below directed to dismiss the bill of complaint and to discharge the receivers appointed by the court.

(c) That this Court may make such further order and direction in the premises as may be in accordance with the law to be applied to the facts in this case.

And your petitioner will ever pray, etc.

WILLIAM D. GORDON,

Secretary of Banking of the Commonwealth of Pennsylvania, Statutory Receiver of Christian A. Fisher Building and Loan Association.

WM. A. SCHNADER,
Attorney General

HAROLD D. SAYLOR,
Deputy Attorney General

LEO WEINROTT,
Special Deputy Attorney General

Counsel for the Secretary of Banking, Petitioner.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DAUPHIN } ss:

William D. Gordon, being first duly sworn, says that he is the Secretary of Banking of the Commonwealth of Pennsylvania, that he has read the foregoing petition and knows the contents thereof, and that the facts stated therein of his own knowledge are true, and the facts stated on information received from others are averred on information received from

reliable sources and he verily believes them to be true; and that as Secretary of Banking he is duly authorized to file this petition and apply for a writ of certiorari as therein prayed for.

Sworn to and subscribed
before me this 19th
day of September, 1934.

WILLIAM D. GORDON

ERNESTINE G. LEWIS,
Notary Public.

My commission expires
August 17, 1936.

[SEAL]

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. The Opinions of the Courts Below.

The opinion of the District Court for the Eastern District of Pennsylvania, filed July 18, 1933, denying the motion for the appointment of a receiver (R. 23) and the opinion of the District Court filed July 24, 1933, authorizing submission of a decree appointing receivers (R. 25), are not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit, filed July 25, 1934, affirming the decree of the District Court (R. 42), is not reported.

II. The Jurisdiction.

(a) The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 936, 28 USCA Sec. 347), on the ground that the Circuit Court of Appeals has decided an important question of general law in conflict with the decision of the highest court of the Commonwealth of Pennsylvania and has so far sanctioned departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(b) The decree to be reviewed is the decree of the United States Circuit Court of Appeals for the Third Circuit entered July 25, 1934 (R. 43), affirming the

order of the District Court for the Eastern District of the United States entered August 2, 1933 (R. 28).

(c) The Secretary of Banking in his answer to the bill of complaint averred that he had taken possession of the business and property of the association pursuant to Pennsylvania law and that such action fully protected the interests of all parties, whether stockholders or creditors of the association. The Secretary of Banking further averred that as receiver of the association his action in administering its affairs was subject to the approval of the Court of Common Pleas of Philadelphia County, and prayed for a dismissal of the bill (R. 21, 22).

(d) The Secretary of Banking appealed to the Circuit Court of Appeals for the Third Circuit, charging error by the District Court in entering its decree of August 2, 1933, appointing receivers and in not dismissing the bill of complaint. The Circuit Court of Appeals denied the claim of the Secretary of Banking for the general reason that the bill of complaint seeking appointment of a receiver to liquidate the association had been filed with the District Court before the Secretary of Banking attempted to take possession of the association and before he filed a certified copy of the certificate with the Court of Common Pleas of Philadelphia County, Pennsylvania.

(e) This case presents a substantial question arising under the laws of Pennsylvania and involving the conflict between the decision of the highest court of that State and that of the Circuit Court of Appeals

for the Third Circuit. It involves not only the continuance of the system created by a sovereign state for the regulation, supervision and liquidation of its quasi-public corporations, by its administrative officers and its courts, but also the existence of the corporations themselves.

III. Statement of the Case.

A full statement of the case has been given in the petition under the heading, "Summary Statement of the Matter Involved" and in the interest of brevity it is not repeated here.

IV. Specification of Errors.

A specification of the errors intended to be urged has been given in the petition under the heading, "Summary Statement of the Matter Involved" and in the interest of brevity it is not repeated here.

V. ARGUMENT.

(a) The Facts.

Christian A. Fisher Building and Loan Association was chartered on June 18, 1919, by the Governor of Pennsylvania and transacted business under the supervision of the Department of Banking of the Commonwealth (R. 5, 21).

On March 31, 1933, five shareholders of the association filed a bill in equity, asking for the appointment of receivers to liquidate it on the ground of insolvency (R. 1, 4). On April 8, 1933, prior to a hearing on the bill, the Secretary of Banking, pursuant to Pennsylvania law and with the consent of the Attorney General, took possession of the business and property of the association and qualified as receiver thereof (R. 16, 21).

Following argument for the Secretary of Banking, who had filed an answer to the bill of complaint, the District Court on July 18, 1933, filed its opinion denying "for the present" the plaintiffs' motion for the appointment of a receiver (R. 23, 24).

On August 2, 1933, despite the fact that the court well knew that since April 8, 1933, the Secretary of Banking had been functioning as receiver of the association and was liquidating its assets, the court appointed Joseph Ominsky and Robert B. Ely, 3rd, receivers of the association (R. 28).

The Commonwealth appealed to the Circuit Court of Appeals for the Third Circuit, which heard argument on October 13, 1933, and on July 25, 1934, sustained the action of the District Court (R. 41, 43). In doing so it did not recognize any distinction in receivership applications for ordinary commercial corporations and those of a quasi-public character, such as banks, trust companies and building and loan associations.

(b) The Secretary of Banking Was Exercising Full Jurisdiction Over Liquidation of the Association Under Pennsylvania Law.

The Pennsylvania Banking Act approved June 15, 1923, P. L. 809 (7 PS Secs. 4, 21, 22, 29), prescribing the powers and duties of the Department of Banking, provided that its supervision, duties and powers should extend and apply to all banks and trust companies, private or unincorporated banks, and building and loan associations.

Pursuant to these provisions of law the Secretary of Banking had taken possession of and was liquidating the affairs of the association when the Federal court sought to interfere by appointing its receivers to supplant the Secretary.

Nowhere in the bill of complaint or in any of the proceedings was it charged that the Secretary of Banking was guilty of neglect or delay in performing his duty. Liquidation was proceeding at a minimum of expense and without wastage of assets.

Whatever the need for action may have been prior to the time the Secretary of Banking took possession, we cannot conceive of any proper reason for the Federal judge appointing receivers in view of the circumstances of the case.

Reference to Pennsylvania law giving the Secretary of Banking exclusive right to liquidate building and loan associations is made at pages 20 to 22 in the brief filed simultaneously herewith in support of the Commonwealth of Pennsylvania's petition for writ of certiorari in the MORTGAGE BUILDING AND LOAN ASSOCIATION CASE.

(c) The District Court Did Not Have Jurisdiction to Appoint Receivers to Liquidate the Association.

Not only is a district court without jurisdiction to appoint receivers to liquidate a quasi-public corporation of a state, but in this case its appointment of receivers was made after the Secretary of Banking as the statutory receiver had actually taken possession of the association's assets.

Reference is made to pages 23 to 26 of the argument on jurisdiction in the brief supporting the Commonwealth's petition for writ of certiorari in the MORTGAGE BUILDING AND LOAN ASSOCIATION CASE.

(d) A Federal Court Should Not Exercise Jurisdiction to Liquidate State Quasi-public Institutions.

Even if the District Court had had jurisdiction to

appoint receivers in this case, it was unquestionably an abuse of discretion to do so under the circumstances.

It was not mandatory on the District Court to appoint receivers and there was absolutely no reason or excuse for making the appointment, in view of the fact that the Secretary of Banking had for months been in possession of the association and was doing more than a Federal receiver could do under Federal law and was acting according to Pennsylvania law as no Federal receiver could act.

Reference is made to the discussion of decisions of the Circuit Courts of Appeals and of the Supreme Court of Pennsylvania in cases involving quasi-public institutions set forth on pages 26 to 33 in the brief filed in support of the Commonwealth's petition for writ of certiorari in the MORTGAGE BUILDING AND LOAN ASSOCIATION CASE.

VI. CONCLUSION.

It is of the gravest consequence if a Federal court is to be permitted to appoint receivers to take over the affairs of a quasi-public corporation which the law of the state giving it existence contemplates shall be supervised, regulated and liquidated only by the statutory officer designated for that purpose. Avoiding the only issue in the case, the District Court and the court below have confirmed the appointment of receivers for Christian A. Fisher Building and Loan Association and have thereby sought to oust the con-

trol of the Secretary of Banking actually in possession as receiver of this institution, on the mere pretext that a bill of complaint was filed before the State officer attempted to take possession.

As stated in the brief of the Commonwealth of Pennsylvania filed with this Court simultaneously herewith in support of the petition for a writ of certiorari in the MORTGAGE BUILDING AND LOAN ASSOCIATION CASE, it is vital that this Court determine this question of paramount public importance:

Shall state systems for the governance of their banks, trust companies, building and loan associations and insurance companies be preserved inviolate and be secured against unrestricted and unregulated attack by receivership practitioners?

The questions which this application suggests should be definitely settled by this Court. We respectfully submit that the petition for certiorari should be granted.

WM. A. SCHNADER,
Attorney General.

HAROLD D. SAYLOR,
Deputy Attorney General.

LEO WEINROTT,
Special Deputy Attorney General.
Counsel for Petitioner.

PETITIONER'S BRIEF

FILE COPY

DEC 15 1934

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 395

WILLIAM D. GORDON, SECRETARY OF BANKING OF PENNSYLVANIA, ETC.,

Petitioner,

v.

JOSEPH OMINSKY AND ROBERT B. ELY, 3RD, FEDERAL RECEIVERS OF CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, ET AL.

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

WM. A. SCHNADER,
Attorney General.

HAROLD D. SAYLOR,
Deputy Attorney General,

Attorneys for Petitioner.

State Capitol,
Harrisburg, Pa.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 395

WILLIAM D. GORDON, SECRETARY OF BANKING OF PENNSYLVANIA, ETC.,
Petitioner,

v.

JOSEPH OMINSKY AND ROBERT B. ELY, 3RD, FEDERAL RECEIVERS OF CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, ET AL.

BRIEF FOR PETITIONER

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

This case comes before the Court on writ of certiorari issued to review a final decree of the Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinions of the District Court for the Eastern District of Pennsylvania, delivered by Judge Dickinson on July 18, 1934, and on July 24, 1933, are not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit, delivered by Judge Davis on July 25, 1934, is reported in 72 F. (2d) 517.

STATUTES INVOLVED

The Federal statute involved in this proceeding and referred to in the courts below is set forth in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 USCA Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different states."

The Pennsylvania statute involved in this proceeding is "The Banking Act 1923," of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, 7 PS Sec. 1 et seq.

The relevant portions of the act are recited in full in the appendix to the brief for the petitioner filed with this Court in COMMONWEALTH OF PENNSYLVANIA, Petitioner, v. JOHN G. WILLIAMS, et al., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION, October Term 1934, No. 394.

JURISDICTION

The rules of this Court have been complied with.

A statement as to jurisdiction is a part of the brief in support of the petition for certiorari, which was printed and filed with this Court.

STATEMENT OF THE CASE

This is an appeal from the order of the Circuit Court of Appeals for the Third Circuit affirming a decree of the District Court for the Eastern District of Pennsylvania.

The district court appointed Joseph Ominsky and Robert B. Ely, 3rd, receivers to take possession of and liquidate Christian A. Fisher Building and Loan Association and restrained all others from taking possession of or intermeddling with any of the property of the association without leave of the court (R. 18).

On appeal by William D. Gordon, Secretary of Banking, and as such, statutory receiver of the association, to the Circuit Court of Appeals that court on July 25, 1934, affirmed the decree of the district court.

The appellant filed his petition for a writ of certiorari on September 21, 1934. Appellees filed an answer opposing the allowance of the writ. The writ was granted on November 5, 1934 (R. 29).

Christian A. Fisher Building and Loan Association was chartered by the Governor of Pennsylvania on June 18, 1919 (R. 3). Its assets aggregated one million dollars ($1,000,000).

All Pennsylvania building and loan associations transact business under the supervision of the State Department of Banking.

On March 31, 1933, five shareholders of the association residing in New Jersey filed their bill in equity in the court below as of March Term, 1933, No. 7619, asking for the appointment of a receiver (R. 2). On that day the court fixed April 21, 1933, as the date for a hearing and ordered that copies of the bill be served upon defendant association on or before April 5, 1933 (R. 9).

On April 8, 1933, at a formal hearing before the Attorney General, held pursuant to law, the defendant association was found to be insolvent and in an unsafe and unsound condition. Thereupon, with the approval of the Attorney General, the Secretary of Banking filed a certificate in his office at Harrisburg taking possession of the business and property of the association, and forthwith filed a certified copy thereof in Court of Common Pleas No. 4 of Philadelphia County, as of March Term, 1933, No. 4445 (R. 11, 13).

By this procedure the Secretary of Banking took formal legal possession of the association, as authorized by the Pennsylvania statutes. Immediately thereafter he took actual possession of the association's books and assets for the purpose of liquidating the association's affairs (R. 13, 14).

On April 8, 1933, the Secretary of Banking appointed Robert B. Ely, 3rd, as his deputy to administer the affairs of the association in liquidation (R. 11).

On April 18, 1933, counsel for the building and loan association filed a suggestion (R. 10) that because the

Secretary of Banking of the Commonwealth of Pennsylvania had taken possession of the business and property of the association, that officer be substituted as defendant in the case. On April 16, 1933, the Secretary of Banking filed his answer to the bill (R. 10).

On July 12, 1933 (R. 1) the case was argued on bill and answer.

On July 18, 1933, Judge Dickinson of the district court filed an opinion denying plaintiffs' motion for appointment of receivers, with leave to the plaintiffs to renew it at any time (R. 15).

The plaintiffs renewed their motion and on July 24, 1933, Judge Dickinson filed a second opinion concluding that he would appoint receivers (R. 16). On August 2, 1933, Judge Dickinson entered a decree appointing Joseph Ominsky and Robert B. Ely, 3rd, as permanent receivers of the association (R. 18).

From this decree the Secretary of Banking appealed to the Circuit Court of Appeals for the Third Circuit, which heard argument on October 13, 1933. On July 25, 1934, the Court through Judge Davis filed its opinion and decree affirming the district court (R. 27, 28).

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Third Circuit erred in that it affirmed the decree of the District Court for the Eastern District of Pennsylvania, ap-

pointing receivers in the matter of "HARVEY STEIGNER AND IDA V. STEIGNER, HIS WIFE, EDITH B. GOODE, JULES SKLAR, PHILIP ZINMAN, V. CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, No. 7619, March Term 1933."

2. The Circuit Court of Appeals for the Third Circuit erred in entering the following order on July 25, 1934:

> "This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of August 2, 1933, of the said District Court in this cause be, and the same is hereby affirmed, with costs." (R. 28).

QUESTIONS PRESENTED

I

Has a Federal court jurisdiction on a shareholder's bill to appoint receivers to liquidate a quasi-public corporation,—a building and loan association,—when the State law provides a complete system for the organization, regulation, supervision and liquidation of such corporations, and does not permit a shareholder to maintain a suit in the State courts for the appointment of any person as receiver to liquidate their af-

fairs, other than the State administrative official who supervises and regulates such corporations?

II

If a Federal court has such jurisdiction, was the appointment of permanent receivers nearly four months after the State administrative official had taken possession of the business and property of the association, an abuse of discretion?

ARGUMENT

Summary

A member or shareholder of a quasi-public corporation,—a bank, an insurance company, or a building and loan association,—is bound by the provisions of the State law governing the organization, regulation, supervision and liquidation of such corporation.

If the State law provides for liquidation exclusively through the State supervisory official, the member or shareholder must be regarded in law as having accepted that provision as a part of his contract.

Under such circumstances the member or stockholder has no standing to maintain a bill in equity in a Federal court praying the appointment of receivers to liquidate the corporation. He cannot have a controversy with the corporation on this subject; and even though he be a citizen of another state, there is no controversy between citizens of different states.

Diversity of citizenship is not of itself a controversy; and unless there is a controversy, diversity of citizenship does not confer jurisdiction on the Federal courts.

But even if jurisdiction exists, the court should have refused the appointment of receivers in this case because

1. The Secretary of Banking had nearly for four months been in possession of the business and property of the association and had been liquidating its affairs pursuant to State law when the district court appointed its receivers.

2. There was no charge of fraud, mismanagement or improper conduct of any kind on the part of the Secretary of Banking in supervising this association; and

3. The Federal courts, as a matter of comity, should not lend themselves to the subversion of a State's policy in the management and liquidation of quasi-public corporations upon the mere assertion of diversity of citizenship and the necessity for liquidation.

The Federal courts should sustain a State's policy in assuring stockholders of its quasi-public corporations, that liquidation, if it becomes necessary, will be in charge of the State's administrative officer charged with the duty of supervising, regulating and liquidating such corporations. They should not interfere with

such officer when he is actually engaged in such liquidation.

Reference is made to the argument and the discussion of decisions of the Circuit Courts of Appeals in cases involving quasi-public institutions, set forth on pages 10 to 59 of the brief filed for the petitioner with this Court in COMMONWEALTH OF PENNSYLVANIA, Petitioner, v. JOHN G. WILLIAMS, et al., Receivers of MORTGAGE BUILDING AND LOAN ASSOCIATION, October Term 1934, No. 394.

CONCLUSION

This case, COMMONWEALTH OF PENNSYLVANIA v. JOHN G. WILLIAMS, et al., October Term 1934, No. 394, GORDON, SECRETARY OF BANKING v. WASHINGTON, et al., and GORDON, SECRETARY OF BANKING v. O'BRIEN, et al., are the only decisions of United States Circuit Courts of Appeal refusing to give effect to State laws governing the method of liquidating quasi-public corporations. All of these cases were decided at about the same time. In the two last mentioned, petitions for certiorari to this Court are pending. They involve the appointment of receivers to take out of the hands of the Secretary of Banking assets of a closed bank.

These decisions reflect a complete change in the attitude of the Circuit Court of Appeals for the Third Circuit on this important subject. In the earlier cases, LYON v. MCKEEFREY, 171 Fed. 384 (1909), and O'NEIL v. WELCH, 245 Fed. 261 (1917), this same court gave

strong expression to its belief that Federal courts should support state systems for the organization, regulation, supervision and liquidation of quasi-public corporations. The former case dealt with a bank; the latter with an insurance company.

Further, we refer to the summary of cases listed in the conclusion to the brief filed in support of the petitioner in COMMONWEALTH OF PENNSYLVANIA v. JOHN G. WILLIAMS, et al., October Term 1934, No. 394.

On principle, we submit that the decree of the Circuit Court of Appeals should be reversed.

The complainants in the district court are stockholders of the building and loan association. They are bound by the laws of Pennsylvania establishing the State's system for the supervision, regulation and liquidation of such associations. They could not have a justiciable controversy with the association regarding its liquidation.

But if such a controversy could exist and diversity of citizenship gave the district court jurisdiction, that court abused its discretion in appointing permanent receivers to liquidate the association when the State Secretary of Banking had actually taken possession of the business and property of the association and was liquidating its affairs. The Federal courts should not in such cases lend their aid to efforts to frustrate the State's settled policy in regulating and liquidating quasi-public corporations.

The district court should not have appointed receivers and attempted to take over the assets of the association from the Secretary of Banking, who, as the State administrative official, was in possession of such assets and was liquidating them. Comity between the Federal and State governments on matters within the proper cognizance of their respective authorities, demanded that the district court should have taken no action at all after the Secretary of Banking had acted.

For these reasons, we believe that the decree of the court below should be reversed.

Respectfully submitted,

WM. A. SCHNADER,
Attorney General.

HAROLD D. SAYLOR,
Deputy Attorney General.

Attorneys for Petitioner.

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Office Supreme Court, U.S.
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OCT 27 1934
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1934. No. 395.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, Statutory Receiver of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION,
Petitioner,

v.

JOSEPH OMINSKY and ROBERT B. ELY, 3RD, Federal Receivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, and HARVEY STEIGNER and IDA V. STEIGNER, His Wife, EDITH B. GOODE, JULES SKLAR and PHILIP ZINMAN,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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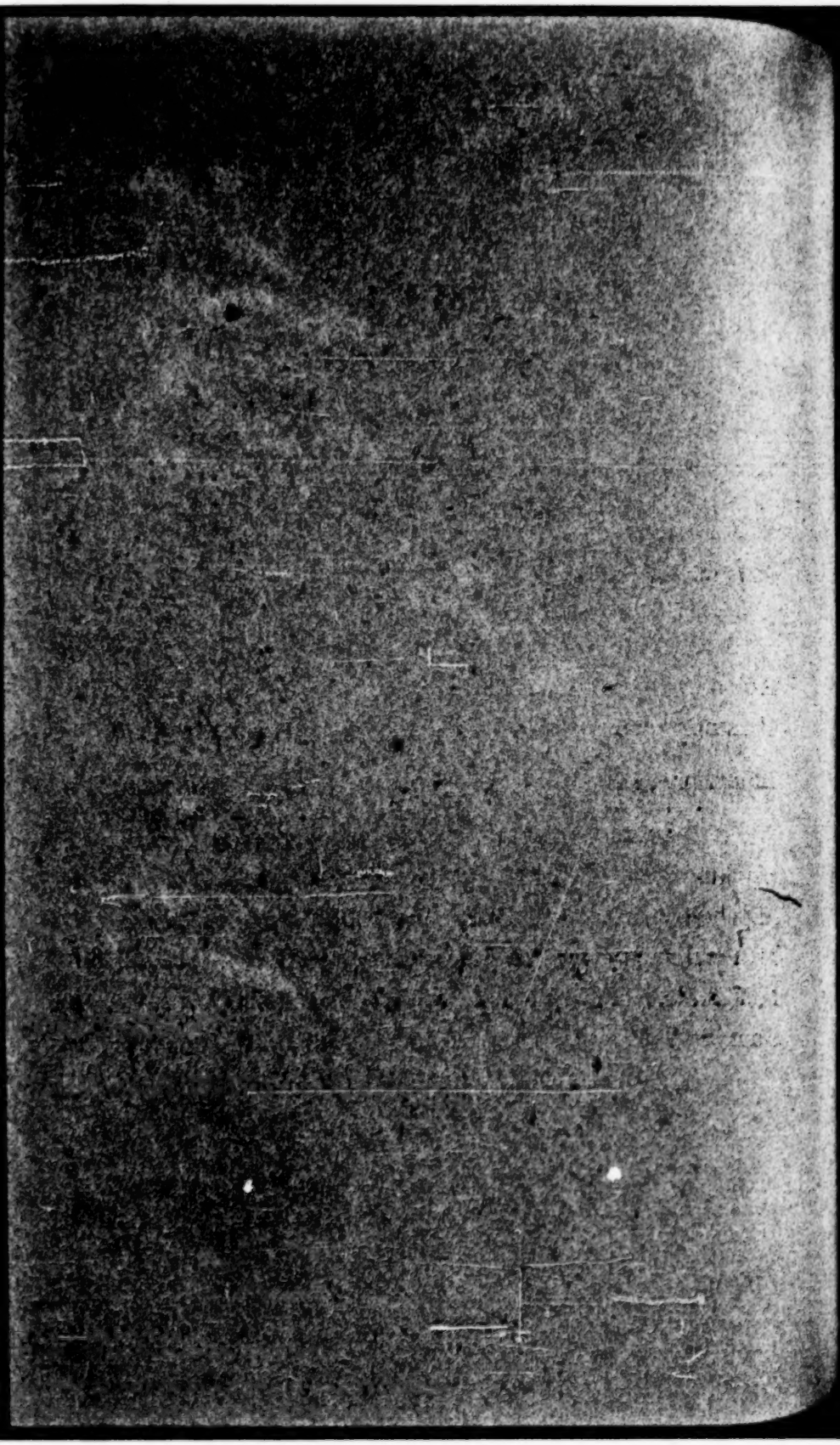

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To the Supreme Court of the United States:

The respondents respectfully submit to this Honorable Court the following brief in opposition to the petition for a writ of *certiorari:*

STATEMENT OF THE CASE.

In view of certain *errata* on page 5 of the petition and misstatements of fact on page 21 of petitioner's argument where it is stated, "Nowhere in the bill of complaint or in any of the proceedings was it charged that the Secretary of Banking was guilty of neglect or delay in performing his duty. Liquidation was proceeding at a minimum of expense and without wastage of assets.," a restatement here is deemed necessary.

On March 31, 1933, a stockholder's Bill in Equity was filed in the District Court of the United States for the Eastern District of Pennsylvania on behalf of five named stockholders residing in New Jersey and all other stockholders who might wish to join in the Bill (R. 1). On the same day a motion for the appointment of receivers was filed, returnable April 21, 1933, (R. 13). On the same day the Bill and motion was duly served (R. 1).

The Bill averred (R. 4 et seq.) that the complainants' claims exceeded $7500.00, that the Christian A. Fisher Building and Loan Association, hereinafter referred to as Association, was indebted to certain preferred creditors to the extent of $200,000.00, that the Association was and had for a long time prior been hopelessly insolvent, that its capital of $1,000,000.00 had been impaired to the extent of $600,000.00, that its principal asset—mortgage loans—had depreciated approximately forty per cent, that all of its assets were in danger of being seized by the preferred creditors, that even though all of its officers were under criminal indictment for frauds committed against the As-

sociation they were still actively managing the Association, and that the respective investments of the complainants in the Association were in imminent jeopardy.

The Bill prayed, *inter alia,* for the appointment of a receiver and/or receivers (R. 10).

On April 18, 1933, the instant petitioner, being State Secretary of Banking, filed a suggestion that he had taken possession of the Association on April 8, 1933, or eight days *after* the Bill had been filed and served (R. 15). The complainants immediately filed objections to the possession of the petitioner which resulted in an agreement that the status quo be preserved pending determination by the District Court.

On the same day an Answer was filed by the petitioner which substantially admitted all the substantive averments of the Bill (R. 16, et seq.). In addition the Answer set forth (R. 20, par. 13) that the petitioner was ignorant of the Association's hopeless insolvency, great impairment of capital and woeful condition of mortgage loans prior to the time he took possession on April 8, 1933.

After several postponements the motion for appointment of a temporary receiver came up before Judge Dickinson of the District Court. He declined to appoint a temporary receiver and suggested that the matter be set down for final disposition (R. 23). It was then agreed by counsel representing the petitioner and the complainants that the case be disposed of on Bill and Answer, which resulted in Judge Dickinson appointing the respondents permanent receivers on July 24, 1933 (R. 25).

The petitioner then appealed from the order appointing the respondents receivers to the Circuit Court of Appeals for the Third Circuit who affirmed the decree of the District Court on the basis of an opinion filed simultaneously in the case of *Commonwealth of Pennsylvania v. John G. Williams, Et Al., Receivers of Mortgage Building and Loan Association,* in which case there was raised the same legal questions as in the instant case (R. 42, 43).

ANALYSIS OF PETITIONER'S REASONS FOR ALLOWANCE OF THE WRIT.

These reasons set forth at pages 7-10 of the petition are, we submit, manifestly insufficient.

The alleged conflict between the instant case and *Amos v. Trust Co.*, 54 F. (2d) 286 (1931) and *Mitchell v. Lay*, 48 F. (2d) 79 (1930), is merely a distinction in the facts and not a conflict in the law. (Reason No. 1, Petition p. 7.)

The citation of *Shapiro v. Wilgus*, 287 U. S. 348, (1932) bears only on the question of discretion to be exercised by a District Judge. (Reason No. 2, Petition pp. 7, 8.)

Whether or not "it has been generally understood and believed throughout the Commonwealth that so-called quasi-public institutions chartered by the State were not subject to the equity jurisdiction of the Federal courts" is, of course, neither here nor there. (Reason No. 3, Petition p. 8.)

Entirely irrelevant, we further submit, is the allegation that the decision of the Circuit Court of Appeals is in conflict with the decision of the Supreme Court of Pennsylvania in the case of *Commonwealth Et Al. v. Penn General Casualty Company*, 316 Pa. 1 (1934). The jurisdiction of the Federal Courts is derived, not from decisions of State Courts, but from the Constitution and from Congress. As pointed out by the Circuit Court in the case of *Commonwealth of Pennsylvania v. John G. Williams Et Al., Receivers of Mortgage Building and Loan Association*, (see Record in that case at p. 93):

> "A state cannot take away the plenary power of the federal courts given to them by Congress, by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescrib-

ing exclusive methods of commencing or conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means (citing cases)." (Reason No. 4, Petition p. 8.)

Nor, we submit, is it ground for *certiorari* that the District Court appointed receivers after the Secretary of Banking had taken possession of the Association's assets thereby creating 'an impossible situation'. A more naive proposition cannot be imagined. Eight days *after* the District Court had acquired jurisdiction by the filing and serving of the Bill, and while a motion for the appointment of receivers was pending, the petitioner in open defiance and disregard of the District Court took possession of the assets of the Association. It is from this 'impossible situation' that the petitioner now prays to be rescued. (Reason No. 6, Petition p. 9.)

We submit, therefore, that no reasons are exhibited why there should be allowance of *certiorari* herein.

ARGUMENT.

Since the petitioner's argument, in the main, follows his argument in support of his simultaneous petition for a writ of *certiorari* in the case of *Commonwealth of Pennsylvania v. John G. Williams, et al., Receivers of Mortgage Building and Loan Association,* the respondents adopt the brief filed in opposition to that petition as adequate answer to the legal propositions raised in that cause and which are the legal propositions in this cause.

There are, however, definite factual differences between the Mortgage Building and Loan case and the instant case which tend to make the instant case much stronger.

In the Mortgage Building and Loan case the petitioner contends that before the Bill was filed it was definitely exercising control over the Association, and further, that that case has in it the element of 'consent decree'.

Such considerations do not apply to the instant case.

In the instant case the petitioner frankly admits that rather than exercise control over the Association as he legally could have done, he had not even examined the affairs of the Association! He was totally ignorant of its financial condition even when he defied the District Court, and, without notice to the complainants or the Court, took possession of the Association eight days *after* the complainants had served their Bill (R. 20, par. 13). And was "the liquidation proceeding at a minimum of expense and without wastage of assets" (Petition p. 21) when the petitioner permitted the very officers who were then under criminal indictment for, and subsequently convicted of, the looting of the Association to remain in active management thereof?

There is no element of 'consent decree' in the instant case. The District Court did not act until an Answer to the Bill had been filed by the petitioner, (not by an officer of the Association), and two hearings held. Counsel for the petitioner agreed that the matter be disposed of on Bill and Answer. Everything that was done by the complainants was done openly and only after ample notice to all parties concerned. It is only fair to state that two postponements were granted so that the petitioner could amend his Answer, but the petitioner chose to stand on the Answer as filed.

Even if it be conceded that the possession of the petitioner rises to the dignity of a Receivership, it is pertinent to here point out that the Circuit Court instead of disposing of the broad questions involved in the instant case could very well have sustained the action of the District

Court by ruling that the petitioner could not engage in an unseemly race with the District Court to acquire possession of the Association's assets. In *Harkin v. Brundage*, 276, U. S. 36, (1928) this Honorable Court said:

> TAFT, C. J. at p. 43: "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction, and constructive possession of property by filing the bill is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute. . . ."

On October 8, 1934, this Honorable Court handed down a decision upon a petition for writ of *certiorari* in the case of *Mitchell v. Maurer*, 69 F. (2d) 233 (1934) in which case the legal question raised by the instant petition was also raised. The Court allowed an appeal, limiting it, however, to the question of whether the appointment of an ancillary receiver upon the petition of a domiciliary receiver was proper; thus apparently dismissing the appeal on jurisdictional grounds.

In its order the Court directed attention to the case of *McCandless v. Furland*, 68 F. (2d) 925 (1934) which is No. 11 on the Argument List for October 11, 1934. It would seem, therefore, that the legal question involved in this case was disposed of in that case by not allowing the appeal on the question of jurisdiction.

CONCLUSION.

It is unfortunate that the petitioner concludes his brief thusly: "Avoiding the only issue in the case . . . the court below . . . confirmed the appointment of receivers . . . and . . . thereby sought to oust the control of the Secretary of Banking actually in possession as receiver of this institution, on the mere pretext that a bill of complaint was filed before the State Officer attempted to take possession" (Petition pp. 23, 24). This effort to make it appear that the complainants anticipated the action of the Secretary of Banking is a palpable twisting of the facts. In the instant case the complainants had no dealings or conversations with any State officers, and, of course, did not know what the petitioner would do. The Answer to the Bill clearly establishes that the petitioner was totally ignorant of the condition of the Association, and after the complainants had already acted it was the petitioner who anticipated the subsequent action of the District Court.

In addition to the hopeless insolvency of the Association the Bill and Answer made out a case of malfeasance as to the officers of the Association and a *prima facie* case of nonfeasance as to the petitioner. The inference is strong that the belated zeal displayed by the petitioner was with a view to covertly maintaining control of any legal proceedings to which he might be made a proper party. If this be the fact, then the proceedings resulting in the petitioner obtaining possession was an obvious attempt on his part to evade the consequences of the appointment of an independent receiver whose duty it might be to hold the petitioner responsible for the failure of the Association to the extent he was properly chargeable therewith.

The settled judicial policy of this Court is diametrically opposed to the continuance in control, directly, or indirectly of officials against whom is made out a case of wrong-doing in office, yet the petitioner here baldly permitted to remain in power the officers who were then under

indictment and later convicted of frauds in connection with this Association. That such a condition should have been tolerated is beyond comprehension; but that this Honorable Court should now be asked to place a stamp of approval on it is inconceivable.

No reason has been presented in support of the novel proposition urged by the petitioner—that the legal rights of non-residents of Pennsylvania as guaranteed by the Constitution of the United States be denied by the Federal Courts.

It is therefore submitted that the Petition should be refused by this Honorable Court.

Respectfully submitted,

OSCAR BROWN,
CHARLES POLIS,
Attorneys for Respondents.

Philadelphia, Pa.

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FILE COPY

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1934. No. 395.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, Statutory Receiver of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION,
Petitioner,

v.

JOSEPH OMINSKY and ROBERT B. ELY, 3RD, Federal Receivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, and HARVEY STEIGNER and IDA V. STEIGNER, His Wife, EDITH B. GOODE, JULES SKLAR and PHILIP ZINMAN,
Respondents.

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 395.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, Statutory Receiver of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION,
Petitioner,

v.

JOSEPH OMINSKY and ROBERT B. ELY, 3RD, Federal Receivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, and HARVEY STEIGNER and IDA V. STEIGNER, His Wife, EDITH B. GOODE, JULES SKLAR and PHILIP ZINMAN,
Respondents.

BRIEF FOR RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

This case comes before the Court on writ of certiorari issued to review a final decree of the Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania delivered by Judge Dickinson on July 24, 1933, is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit, delivered by Judge Davis on July 25, 1934, is reported in 72 F. (2d) 517.

STATUTES INVOLVED.

The Federal statute involved in this proceeding and referred to in the courts below is set forth in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 USCA Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different states."

The Pennsylvania statute involved in this proceeding is "The Banking Act of 1923," of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, 7 PS Sec. 1 et seq.

The relevant portions of the act are recited in full in the appendix to the brief for the petitioner filed with this Court in *Commonwealth of Pennsylvania, Petitioner, v. John G. Williams, et al., Receivers of Mortgage Building and Loan Association*, October Term 1934, No. 394.

STATEMENT OF THE CASE.

On March 31, 1933, a stockholder's Bill in Equity was filed in the District Court of the United States for the Eastern District of Pennsylvania on behalf of five named stockholders residing in New Jersey and all other stockholders who might wish to join in the Bill (R. 1). On the same day a motion for the appointment of receivers was filed, returnable April 21, 1933, (R. 9). On the same day the Bill and motion was duly served (R. 1).

The Bill averred (R. 2 et seq.) that the complainants' claims exceeded $7500.00, that the Christian A. Fisher Building and Loan Association, hereinafter referred to as Association, was indebted to certain preferred creditors to the extent of $200,000.00, that the Association was and had for a long time prior been hopelessly insolvent, that its capital of $1,000,000.00 had been impaired to the extent of $600,000.00, that its principal asset—mortgage loans—had depreciated approximately forty per cent, that all of its assets were in danger of being seized by the preferred creditors, that even though all of its officers were under criminal indictment for frauds committed against the Association they were still actively managing the Association, and that the respective investments of the complainants in the Association were in imminent jeopardy.

The Bill prayed, *inter alia*, for the appointment of a receiver and/or receivers (R. 7).

On April 18, 1933, the instant petitioner, being State Secretary of Banking, filed a suggestion that he had taken possession of the Association on April 8, 1933, or eight days *after* the Bill had been filed and served (R. 10). The complainants immediately filed objections to the possession of the petitioner which resulted in an agreement that the status quo be preserved pending determination by the District Court.

On the same day an Answer was filed by the petitioner

which substantially admitted all the substantive averments of the Bill (R. 10, et seq.). In addition the Answer set forth (R. 13, par. 13) that the petitioner was ignorant of the Association's hopeless insolvency, great impairment of capital and woeful condition of mortgage loans prior to the time he took possession on April 8, 1933.

After several postponements the motion for appointment of a temporary receiver came up before Judge Dickinson of the District Court. He declined to appoint a temporary receiver and suggested that the matter be set down for final disposition (R. 15). It was then agreed by counsel representing the petitioner and the complainants that the case be disposed of on Bill and Answer, which resulted in Judge Dickinson appointing the respondents permanent receivers on July 24, 1933 (R. 16).

The petitioner then appealed from the order appointing the respondents receivers to the Circuit Court of Appeals for the Tihrd Circuit who affirmed the decree of the District Court on the basis of an opinion filed simultaneously in the case of *Commonwealth of Pennsylvania v. John G. Williams, Et Al., Receivers of Mortgage Building and Loan Association,* in which case there was raised the same legal questions as in the instant case (R. 27).

On September 21, 1934, a petition for certiorari was filed, and on November 5, 1934, your Honorable Court granted a certiorari.

ARGUMENT.

Since the petitioner's argument, in the main, follows his argument on the writ of certiorari in the case of *Commonwealth of Pennsylvania v. John G. Williams, et al., Receivers of Mortgage Building and Loan Association,* we adopt the respondents' brief filed in that case as adequate answer to the question of the District Court's jurisdiction in the instant case.

There are, however, definite factual differences between the Mortgage Building and Loan case and the instant case which tend to make the instant case much stronger.

In the Mortgage Building and Loan case the petitioner contends that before the Bill was filed it was definitely exercising control over the Association, and further, that that case has in it the element of "consent decree".

Such considerations do not apply to the instant case.

In the instant case the petitioner frankly admits that rather than exercise control over the Association as he legally could have done, he had not even examined the affairs of the Association! He was totally ignorant of its financial condition even when he practically defied the District Court, and, without notice to the complainants or the Court, took possession of the Association eight days *after* the complainants had served their Bill.

There is no element of "consent decree" in the instant case. The District Court did not act until an Answer to the Bill had been filed by the petitioner, (not by an officer of the Association), and two hearings held. Counsel for the petitioner agreed that the matter be disposed of on Bill and Answer. Everything that was done by the complainants was done openly and only after ample notice to all parties concerned. It is only fair to state that two postponements were granted so that the petitioner could amend his Answer, but the petitioner chose to stand on the Answer as filed.

POINT I.

A Federal Court which has obtained jurisdiction and constructive possession of property by the filing of a Bill in Equity may not be deprived of its jurisdiction because its receivers did not obtain physical possession of the property in dispute.

Not only does the petitioner contend that the Federal

Court was deprived of its jurisdiction when he took possession of the property of the Association, but more—the Federal Court was guilty of an abuse of discretion in attempting to translate its jurisdiction into reality by appointing receivers. The petitioner bases this amazing theory on the principle of comity between two concurrent tribunals—one should not interfere with the other.

At the outset it may be pointed out that at least one of the cases the petitioner relies upon—*Ulmer v. Falmouth*, 93 Me. 302 (1899)—has been overruled *sub silentio*, by *Smith et al. v. Bath Loan and Building Association*, 126 Me. 49 (1927).

> *Philbrook, J.*, at p. 61. . . . "Except in a few jurisdictions where the statutory remedy of dissolving building and loan associations on suit brought by state officials is exclusive, and precludes the appointment of a receiver in an ordinary action in equity, it is the rule, both under statute and otherwise, that resort may be had to a court of equity for the appointment of a receiver of a building and loan association, and on the filing of a sufficient bill by the proper party, the court will appoint a receiver when it appears that it is unsafe and inexpedient to further continue the business, either because of a loss of public confidence therein, or because of its insolvency or mismanagement."

Since the purpose of the petitioner in taking possession of the Association is admittedly (Par. No's. 18, 19—Record, pp. 14, 15) the same as that for which the Bill was filed, the subject matter in litigation and the relief sought are identical.

The rule governing such a conflict of jurisdiction is familiar. In *Harkin v. Brundage*, 276 U. S. 36 (1927) your Honorable Court said:

> *Taft, C. J.*, at p. 43, "The principle which should

govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction, and constructive possession of property by filing the bill is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute. . . ."

Clearly the petitioner cannot indulge in an unseemly race with the Federal Court to acquire possession of the association. Cases to support this proposition are many. We list the following illustrations:

(1) The decree of a federal court, which first acquires jurisdiction of the subject matter and establishes a mechanic's lien, is not affected by a later proceeding in a state court in which a sale of the property and a different application of the proceeds are ordered. *McGraw v. Walsh* (W. Va. 1916) 232 F. 122, 146 C. C. A. 314.

(2) A state court may not interfere in any way with the enforcement of an order of a federal court in condemnation proceedings of which the federal court has jurisdiction, the order being executory until the object of the proceedings is accomplished. *Woods v. Root* (Illinois 1903) 123 F. 402, 59 C. C. A. 206.

(3) The jurisdiction of a federal court having attached, the right of the plaintiff to prosecute his suit in that court cannot be arrested or taken away by garnishee process against the defendant in a state court. *Mack v. Winslow* (Ky. 1893) 59 F. 316, 8 C. C. A. 134; *Deming v. Orient Ins. Co.* (C. C. Iowa, 1896) 78 F. 1.

(4) A defendant, by going into a Surrogate's Court could not defeat or impair the jurisdiction of a federal court, previously attached, or deprive the plaintiff of his

right as a citizen of another state to the cognizance of a federal court. *Brown v. Fletcher* (N. Y. 1916) 231 F. 92, 145 C. C. A. 280.

(5) A court, having gained prior jurisdiction of a cause by the service of its process, is not deprived of its jurisdiction by reason of the actual seizure of the property in controversy by the officer of a court having concurrent jurisdiction. *Owens v. Ohio Cent. R. Co.* (C. C. W. Va. 1884) 20 F. 10. The filing of a bill in equity and issuing of a subpœna, gave a federal court jurisdiction as against an action subsequently begun in a state court by a summons which was served before service of the writ of subpœna issued by the federal court. *Farmer's Loan & Trust Co. v. Lake St. El. R. Co.* (1900) 177 U. S. 51, 20 S. Ct. 564, 44 L. Ed. 667, reversing judgment (1898) 173 Ill. 439, 51 N. E. 55, writ of error dismissed *Lake St. Elevated R. Co. v. Farmers' Loan & Trust Co.* (1901) 182 U. S. 417, 21 S. Ct. 870, 45 L. Ed. 1161; *Barker v. Eastman* (N. H. 1913) 206 F. 865, 124 C. C. A. 525, affirming decree (C. C. 1911) 192 F. 659.

(6) Where bills were tendered for filing in a federal court pursuant to notice previously given, and leave was withheld out of courtesy to the defendant Attorney General, who was absent, but restraining orders were issued, based on the foregoing, the court's jurisdiction over the subject matter thus obtained was held not ousted by the institution of suits in a state court subsequently, though before the formal filing of the bills. *St. Louis & S. F. R. Co. v. Hadley* (C. C. Mo. 1907) 155 F. 220.

A situation paralleling the case at bar arose in *Employers' Reinsurance Corporation v. Boston Mutual Life Insurance Co.*, 45 F. (2d) 593 (1930). A bill for a receiv-

ership was filed in a state court but before the state court appointed a receiver, a bill was filed in the federal court which immediately appointed a receiver who took possession. On appeal it was held that the state court had first acquired jurisdiction and the federal action was dismissed, citing *Farmers' Loan and Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, *supra.*

In *O'Neil v. Welch*, 245 Fed. 261 (1917), *after* proceedings had been commenced in a state court, the federal court appointed a receiver. On appeal, it was held that as the first proceedings were in the state court, the federal court could not appoint a receiver. The court laid down as a test—the court which first obtained jurisdiction had the right to proceed to its final determination without interference from the other.

In the case at bar, the action of the Secretary of Banking in taking physical possession of the property *after* the District Court had entertained the Bill obviously smacks of a resolve to oust that Court of its jurisdiction.

POINT II.

It is a proper exercise of power for a Federal Court to appoint receivers for a building and loan association when an answer filed on behalf of an intervening state Secretary of Banking admits he permitted the association to be operated and controlled by five officers who were under indictment for frauds in connection with the association, and that he was ignorant of its hopelessly insolvent condition prior to the time he took possession of the association.

Whether or not the District Court was guilty of an abuse of discretion in appointing receivers must of necessity depend on what was before that Court.

Now, just what does the Record show?

COMPLAINANTS' BILL.	PETITIONER'S ANSWER.
13. By reason of its present insolvent condition, which has existed for the past year and more, defendant has abandoned entirely the active conduct of its business; for more than two years has made no mortgage loans; has practically ceased making stock loans; for more than two years has made no payment of withdrawals, although it now has a withdrawal list in excess of $300,000, and the payment of dues, interest and premiums on its outstanding mortgage loans are considerably in arrears in an amount which cannot be estimated by the plaintiffs. (Record, pp. 5, 6.)	13. In reply to paragraph No. 13, respondent admits that the association at the present time is insolvent in that it is unable to pay its stockholders in full *but has no knowledge as to how long this condition existed prior to the date the Secretary of Banking took possession thereof on April 8, 1933.* It is denied however, that the association had abandoned entirely the active conduct of its business. On the contrary, it is averred that the association had functioned for some time prior to the date possession of the association was taken by respondent on a limited basis. That is to say, steps necessary to protect the assets of the association; payments were received on account of the principal and interest but no contributions were received in the way of dues. (Record, pp. 13, 14.) (Italics ours.)
16. The following officers of the defendant association and who are still in control of the association's business, have been indicted for embezzlement and misapplication of building and loan funds in the Court of Quarter Sessions of Philadelphia County, as follows:	16. Admitted with the exception that Christian A. Fisher, the president of the association, has been acquitted. (Record, p. 14.)

President—Christian A. Fisher, October Term, 1932, No. 1338-42, November Term, 1932, No. 1224-33, 51, 53, 58, 63.
Vice-President — Fred Shmidheiser, October Term, 1932, No. 1342, 47, November Term, 1932, No. 1234-49, 56, 57, 66-70.
Secretary—P. William Huster, October Term, 1932, No. 1340, 41, November Term, 1932, No. 1224-30.
Treasurer—Harry A. Rau, October Term, 1932, No. 1338-41, November Term, 1932, No. 1224-49.
Conveyancer—George A. Nahm, October Term, 1932, No. 1343-47, November Term, 1932, No. 1234-36, 50-55, 61-64, 69, 70. (Record, p. 6.)

On these pleadings how could the District Court refuse to appoint receivers?

CONCLUSION.

It is therefore submitted that the decree of the court below should be affirmed.

Respectfully submitted,

OSCAR BROWN,
CHARLES POLIS,
Attorneys for Respondents.

Philadelphia, Pa.

SUPREME COURT OF THE UNITED STATES.

No. 395.—October Term, 1934.

William D. Gordon, Secretary of Banking of Pennsylvania, etc., Petitioner,
vs.
Joseph Ominsky and Robert B. Ely, 3rd, Federal Receivers of Christian A. Fisher Building and Loan Association, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 4, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, directed to the Court of Appeals for the Third Circuit, which was granted, — U. S. —, to resolve the questions of public importance also involved in No. 394, *Commonwealth of Pennsylvania* v. *Williams, et al.*, just decided.

On March 31, 1933, certain citizens of New Jersey, shareholders in the Christian A. Fisher Building & Loan Association, a Pennsylvania corporation, filed their bill of complaint against the Association in the district court for eastern Pennsylvania. The bill alleged the requisite diversity of citizenship and jurisdictional amount; that the Association was insolvent; that its assets might be dissipated and sacrificed in the efforts of creditors to realize payment of their claims from its property, and prayed the appointment of receivers and an injunction. Thereafter, the Secretary of Banking, acting under the Banking Act of the Commonwealth of Pennsylvania of June 15, 1923, P. L. 809, after due hearing, found the Association to be insolvent; and on April 8, 1933, he issued and filed his certificate, taking possession of the association and appointing a special deputy agent to assist in the liquidation of its business and property. The state Secretary of Banking, petitioner here, was substituted as defendant in the pending suit and filed an answer, in which he set up the action taken by him and prayed that the bill of complaint be dismissed. After a hearing upon bill and answer, the district judge entered his decree ap-

pointing permanent receivers, respondents here, and enjoining all persons from taking possession of, or interfering with, the property of the defendant. The decree was affirmed by the Court of Appeals for the Third Circuit. 72 F. (2d) 517.

For reasons stated at length in *Commonwealth of Pennsylvania* v. *Williams, et al., supra,* we conclude that the district court acquired jurisdiction of the cause upon the filing of the bill of complaint in that court. See also No. 431, *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania, ex rel. Schnader, Attorney General,* decided this day. But we think that, upon the bare showing in a shareholder's bill that the defendant corporation was insolvent, the court would have been well within the exercise of a proper discretion had it declined the appointment of receivers and directed a dismissal of the bill for want of equity. In any event, the allegations of the answer, that the possession and control of the assets of the defendant by the Secretary of Banking, pursuant to statute, will result in the preservation of the assets of the defendant and the proper distribution of funds realized from their liquidation, are not challenged. The considerations which should have induced the district court, in the proper exercise of its discretion, to relinquish jurisdiction in *Commonwealth of Pennsylvania* v. *Williams, et al., supra,* should have led to the same result here.

The decree will be reversed and the cause remanded. The district court will direct that all assets and property in the possession of the receiver be, with all convenient speed, surrendered to the Secretary of Banking, the receivers retaining only sufficient of the assets of the defendant association to pay their reasonable fees and any obligations lawfully incurred by them. Jurisdiction will be retained by the district court only for that purpose and for the purpose of promptly discharging the receivers and settling their accounts, after which the suit will be dismissed.

Reversed.

A true copy.

Test:

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